Winerich Sdn Bhd v Alpha Atlas Management Sdn Bhd

HIGH COURT (MELAKA) — COMPANIES WINDING UP NO MT 1-28-48 OF 2002
LOW HOP BING J
10 OCTOBER 2003

Civil Procedure *—Jurisdiction — Inherent jurisdiction of court — Ambit of — Whether can be used to take away substantive rights that may have vested — Rules of the High Court 1980 O 92 r 4*

Companies and Corporations *— Petition — Application to strike out — Inherent jurisdiction of court — Whether merits of petition to be considered*

The petitioner alleging that the respondent was indebted to it issued and served the statutory notice of demand under s 218 of the Companies Act 1965 and subsequently presented a petition to wind up the respondent. The respondent applied by notice of motion (encl 8) to strike out the petition under O 92 r 4 of the Rules of the High Court 1980 ('RHC'). At the hearing of encl 8, the parties did not dispute the applicability of O 92 r 4.

Held, dismissing the application with costs:

(1) In order to succeed under O 92 r 4 of the RHC, the respondent had to satisfy the court that the petitioner's presentation of the petition constituted: (a) an injustice to the respondent; or (b) was an abuse of the process of the court (see p 738D–E).

(2) At the hearing of encl 8, the court was not concerned with the merits of the petitioner's petition but had to consider whether the petitioner's presentation of the petition ipso facto constituted an abuse of the process of the court. On the facts, the petitioner was not disentitled from presenting the petition as there was an allegation of fact against the respondent in relation to the indebtedness, the service of the statutory notice of demand and the subsequent presentation of the petition (see p 738G–H).

(3) The presentation of the petition was an exercise of a substantive legal right by way of a due process of the court. Its merits, strength or weakness had to be decided at the actual hearing of the petition itself. The inherent jurisdiction of the High Court under O 92 r 4 is a procedural rule and is not intended to alter substantive rights (see p 739B–C).

[Bahasa Malysia summary

Pempetisyen yang telah mendakwa bahawa responden berhutang kepadanya mengeluarkan dan menyampaikan notis tuntutan berkanun di bawah s 218 Akta Syarikat 1965 dan kemudian telah mengemukakan petisyen ntuk menggulungkan responden.

Responden telah memohon melalui notis usul (kandungan 8) untuk menolak petisyen itu di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pada pendengaran kandungan 8, parti-parti tidak mempertikaikan pemakaian A 92 k 4.

Diputuskan, menolak permohonan dengan kos:

(1) Untuk berjaya di bawah A 92 k 4 KMT, responden perlu memuaskan mahkamah bahawa pengemukaan petisyen pempetisyen mengandungi: (a) ketidakadilan kepada responden; atau (b) adalah penyalahgunaan proses mahkamah (lihat ms 738D–E).

(2) Pada pendengaran kandungan 8, mahkamah tidak menimbangkan merit-merit petisyen pempetisyen tetapi perlu menimbangkan sama ada pengemukaan petisyen pempetisyen ipso facto adalah penyalahgunaan proses mahkamah. Pada fakta-fakta, pempetisyen berhak mengemukakan petisyen memandangkan terdapat pendakwaan fakta terhadap responden berkenaan hutang itu, penyampaian notis tuntutan berkanun itu dan pengemukaan petisyen itu (lihat ms 738G–H).

(3) Pengemukaan petisyen itu adalah pelaksanaan hak undang-undang substantif melalui proses mahkamah. Merit-merit, kekuatan dan kelemahan perlu dibicarakan pada pendengaran petisyen tu. Bidangkuasa sedia ada Mahkamah Tinggi di bawah A 92 k 4 adalah keadah prosedur dan tidak bertujuan mengubah hak-hak substantif (lihat ms 739B–C).]

Notes

For cases on inherent jurisdiction of court, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3797-3807.

For cases on application to strike out petition, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 446.

Cases referred to

Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener) [1995] 2 MLJ 421 (refd)

Legislation referred to

Companies (Winding Up) Rules 1972 r 25
Companies Act 1965 s 218
Rules of the High Court 1980 O 92 r 4

Ramesh Supramaniam (*Jagjit Singh* with him) (*Rastam Singh & Co*)
Mahendra K Balakrishnan (*Kesavan & Assoc*)

Low Hop Bing J:

Application

The application before me is encl (8) which is the respondent's application by way of a notice of motion to strike out the petitioner's petition to wind up the respondent in encl (2), under O 92 r 4 of the Rules of the High Court 1980 ('the RHC').

Factual background

The petitioner's petition alleges that the respondent is indebted to the petitioner in the sum of RM29,500 being the balance sum due in relation to the renovation works carried out by the petitioner on the respondent's premises at Pantai Plaza, No 5, Jalan 4/83A, Off Jalan Pantai Baru, Kuala Lumpur for a total sum of RM65,490.

The petitioner made a claim on the said balance sum by way of a notice issued by the petitioner's solicitors under s 218 of the Companies Act 1965 ('the statutory notice of demand') and allegedly served on the respondent.

The respondent has allegedly refused, neglected or failed to pay the said balance sum within the three weeks stated in the statutory notice of demand.

Submission for respondent

It was submitted by learned counsel Mr Ramesh Supramaniam and Mr Jagjit Singh that the filing of the winding up petition is an abuse of the process of the court as the respondent was not privy to the contract entered into by the petitioner with Atlas Corporation Sdn Bhd, and that the petitioner's alleged claim is baseless and misconceived, besides being defective for non-compliance with the provisions of the Companies Act 1965 and the Companies (Winding Up) Rules 1972 ('the Rules').

Response by petitioner

Mr Kesavan P Krishnan, learned counsel for the petitioner, contended on the merits of the petition that the respondent's submission that the respondent was merely an agent was a bare allegation and should be rejected.

He added that the non-particularization of the petitioner's claim in the statutory notice of demand is not fatal and that the respondent did not reply to the positive assertion on the amount claimed and so should be deemed to have admitted the assertion.

He then argued that the respondent is estopped from disputing the indebtedness to the petitioner, and that the alleged overstated interest did not invalidate the statutory notice of demand as the sum claimed exceeded RM500, which the respondent was unable to pay, thereby evidencing the respondent's insolvency.

On the issue of non-compliance with r 25 of the Rules, it was argued that it was a curable irregularity. A

There are other submissions, also concerning the merits of the petitioner's petition.

Decision of the court B

At the outset, it must be observed that the parties have not disputed against the applicability of O 92 r 4 of the RHC to this application and I will therefore proceed on that basis.

Order 92 r 4 of the RHC which was the sole ground relied upon by the respondent in support of the application to strike out the petitioner's petition, reads as follows: C

> 4 Inherent powers of the Court
>
> For the removal of doubts, it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. D

Upon an anxious consideration of O 92 r 4 of the RHC, I am of the view that in order to succeed, the respondent must satisfy the court that the petitioner's presentation of the petition constitutes:

(a) an injustice to the respondent; or E

(b) is an abuse of the process of the court.

The essence of the submissions for the respondent as adumbrated above appears to have confined to the relevant issue of 'an abuse of the process of the court' and I shall consider it in that light. F

The expression 'an abuse of the process of the court' is nowhere defined in the RHC generally or O 92 r 4 specifically.

The submissions presented by the respective learned counsel for both the parties herein concerned extensively the merits of the petition but have not delved into the issue as to whether a proper consideration of the facts as alleged in the petition would enable the court to positively conclude that the petitioner's petition is indeed an abuse of the process of the court. G

At this stage of the hearing of this application on the aforesaid ground, I am not to be concerned with the merits of the petitioner's petition, but must consider the issue whether the petitioner's presentation of the petition *ipso facto* constitutes an abuse of the process of the court. H

On the narrative of facts as unfolded above, I am of the view that the petitioner is not disentitled from presenting the petition as there is an allegation of fact against the respondent in relation to the indebtedness, the service of the statutory notice of demand allegedly effected on the respondent and subsequently the presentation of this petition. I

I am unable to see how any court can positively conclude that the presentation of the petition could constitute an abuse of the process of the

court. On the contrary, I am of the view that it is an exercise of a substantive legal right by way of a due process of the court, although I hasten to add that its merits, strength or weakness must be decided at the actual hearing of the petition itself and not at this stage of the interlocutory application.

It is trite law that O 92 r 4 of the RHC is a part of the procedural and not substantive law: *Malaysian High Court Practice* (1998 Desk Ed) Vol 1 MLJ p 5760. In *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 MLJ 421, I held that the inherent jurisdiction of the court under this rule is a procedural rule and is not intended to alter substantive rights. It must be applied to do justice to the parties and to secure fairness in a trial between them and not for any other purpose such as taking away the substantive rights of either party.

In the circumstances, I am of the view that the respondent's application in encl (8) and the reliance on O 92 r 4 of the RHC is fundamentally flawed and is devoid of merits. It is hereby dismissed with costs.

Application dismissed with costs.

Reported by Andrew Christopher Simon